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and class of those similarly situated

16 UNITED STATES DISTRICT COURT
17
18 NORTHERN DISTRICT OF CALIFORNIA
19
20 SAN FRANCISCO DIVISION

21 KEVIN WOODRUFF, on behalf of himself
and classes of those similarly situated,

22 Plaintiff,

23 vs.

24 BROADSPECTRUM DOWNSTREAM
SERVICES, INC., formerly TIMEC
COMPANY, INC., a corporation,

25 Defendant.

Case No. 3:14-CV-04105-EMC

**PLAINTIFF'S NOTICE OF MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
UNOPPOSED MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AND ENTRY OF
JUDGMENT**

Date: May 4, 2017

Time: 1:30 p.m.

Place: Courtroom 5, 17th Floor

Judge: Honorable Edward M. Chen

Third Amended Complaint: December 16, 2016

/ Trial Date: None Set

NOTICE OF MOTION AND MOTION

TO DEFENDANT BROADSPECTRUM DOWNSTREAM SERVICES, INC., formerly TIMEC COMPANY, INC., AND ITS COUNSEL OF RECORD AND ALL OTHER INTERESTED PARTIES:

PLEASE TAKE NOTICE THAT on May 4, 2017, at 1:30 p.m., in Courtroom 5 on the 17th floor of this Court located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiff Kevin Woodruff will move and hereby moves the Court for an order granting the following relief:

- (1) Confirming as final the certification of the settlement class under Federal Rule of Civil Procedure 23 (Rule 23);
- (2) Confirming as final the appointment of Plaintiff Kevin Woodruff as the class representative of the class pursuant to Rule 23;
- (3) Approving the Parties' class action settlement as fair, reasonable, and adequate, and binding on all Class Members;
- (4) Directing the Parties and the Settlement Administrator to implement the terms of the Agreement pertaining to the distribution of the Settlement Fund and Net Settlement Fund;
- (5) Making findings of fact and stating conclusions of law in support of the foregoing; and,
- (6) Directing the entry of judgment, as proposed by the Parties and in accordance with the Parties' Agreement, pursuant to Fed. R. Civ. P. 54 and 58.

This Motion is based on the parties' Amended Stipulation of Class Action Settlement and Release (Dkt. No. 79-1), the accompanying Memorandum of Points and Authorities, the Declarations of John T. Mullan, named Plaintiff Kevin Woodruff, and Settlement Administrator Amanda Myette (Senior Project Manager, Rust Consulting), the proposed order and judgment

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1 filed herewith, the other records and pleadings filed in this action, and upon such other
2 documentary and oral evidence or argument as may be presented to the Court at the hearing of
3 this Motion.

4
5 DATED: March 30, 2017

Respectfully submitted,

6 RUDY, EXELROD, ZIEFF & LOWE, LLP
7 LEIGH LAW GROUP

8 By: /s/ John T. Mullan

9 JOHN T. MULLAN

10 *Attorneys for Plaintiff KEVIN WOODRUFF*
11 *and class of those similarly situated*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this class action lawsuit, Plaintiff Kevin Woodruff requests that the Court grant final approval of the Parties’¹ settlement of Plaintiff’s claims pleaded in the Third Amended Complaint pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. The settlement, in the amount of \$3,450,000, is “fair, reasonable, and adequate” within the meaning of Rule 23(e). The Class includes 2,588 individuals, comprised of all Field Employees (safety attendants, laborers, and helpers) employed by Defendant on a primarily temporary basis in California at various times between September 10, 2010, and the date of the Court’s order preliminarily approving the Settlement, December 19, 2016.² Class Members stand to recover substantial and immediate monetary benefits under the settlement. As of this date, no Class Member has opted out, such that all Class Members will participate in the settlement. The class notice directed Class Members to send any objections to the Court. Class Counsel are not aware of any objections filed by the Court, and neither counsel nor the settlement administrator has received any objections (Declaration of John T. Mullan In Support of Motion for Final Approval (“Mullan Decl.”), ¶3; Declaration of Amanda Myette In Support of Motion for Final Approval (“Myette Decl.”), ¶12).

The \$3.45 million non-reversionary settlement satisfies the Ninth Circuit’s standards for approval. Class Counsel vigorously litigated this case over the course of two years, conducting extensive formal and informal discovery and engaging in active motion practice. At the time the

¹ All capitalized terms appearing in this memorandum that are not defined herein have the meanings assigned to them in the Amended Stipulation of Class Action Settlement and Release (Dkt. No. 79-1).

² Plaintiff’s Motion for Preliminary Approval estimated the class size at approximately 2,000 individuals employed primarily on a temporary basis; however, this number was increased based on Defendant’s further review of its employment records in preparing the Class list and employee turnover since the information was provided to Class Counsel prior to filing the motion for preliminary approval. Notwithstanding this, the number of compensable workweeks at issue — 62,458 — turned out to be fewer than the 69,000 previously estimated (Mullan Decl., ¶6). Accordingly, the per workweek recovery — more than \$36 — is greater than that estimated in the Parties’ Joint Response in Support of Plaintiff’s Unopposed Motion for Settlement Class Certification and Preliminary Approval of Class Action Settlement, which estimated a per workweek recovery of \$31.45. (Dkt. No. 78, p. 3).

1 settlement was reached, the Parties had fully briefed Plaintiff's motion for class certification.
 2 Class Counsel were fully informed about the strengths and weaknesses of the claims of Class
 3 members at the time the settlement was negotiated.

4 The settlement is in line with the strength of Class Members' claims given the risk,
 5 expense, complexity, and likely duration of further litigation, including the risks of establishing
 6 liability, proving damages at trial and on appeal, and the risks of securing and maintaining class
 7 action status throughout the trial and on appeal. *See Churchill Vill., L.L.C. v. Gen. Elec.*, 361
 8 F.3d 566, 575-76 (9th Cir. 2004) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
 9 1998)). It is uncertain whether Plaintiff would have ultimately been able to certify and maintain
 10 the case as a class action, and to have prevailed on liability for the Class through summary
 11 judgment, at trial, and on appeal. Even if Plaintiff did prevail on liability, it is uncertain what
 12 amount he would have recovered for the Class. Weighing the risks, time, and expense of
 13 continued litigation against the substantial benefits afforded now by the proposed \$3.45 million
 14 settlement, the proposed settlement is in the best interest of the Class.

15 To date, the response of Class Members to the proposed settlement has been very
 16 favorable.³ To Class Counsel's knowledge, no Class Member has objected to the settlement.
 17 None of the 2,588 Class Members have opted out, such that all Class Members to date have
 18 decided to participate in the settlement. The lack of any objections and the fact that no Class
 19 Member has opted out indicate that the Class has a favorable view of the settlement. This factor
 20 too weighs in favor of final settlement approval.

21 In connection with requesting final settlement approval, Plaintiffs also request that the
 22 Court: (1) confirm as final the certification of the Class under Fed. Rules Civ. P. 23(a) and
 23 23(b)(3); (2) confirm as final the appointment of Plaintiff Woodruff as the class representative of
 24 the Class; and (3) enter the proposed final approval order in the form submitted herewith and
 25

26 ³ The period to submit objections, requests for exclusion, or to contest an individual's
 27 workweek calculation runs until April 7, 2017. Class Counsel will provide an update to the Court
 28 regarding any such response received from Class Members with their reply brief, to be filed on
 April 13, 2017.

enter judgment in the form submitted herewith. Additionally, while the settlement is not contingent upon any service payment, Plaintiff requests the Court award a service payment to compensate Plaintiff for his service to and risks taken on behalf of the Class.

II. FACTUAL AND PROCEDURAL HISTORY

A. Investigation, Negotiations and Settlement

As described more fully in the Memorandum of Points and Authorities in support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 73), the Parties engaged in extensive litigation over the course of two years, including active motion practice and discovery. Class Counsel conducted a detailed factual investigation of the claims at issue in this case, interviewing approximately 50 putative class members (Declaration of John T. Mullan In Support of Plaintiff's Motion for Preliminary Approval ("Mullan Decl. ISO Preliminary Approval"), Dkt. No. 74, ¶21). The parties also engaged in extensive formal discovery, including responding to written discovery requests, production of documents, and taking or defending a total of more than 20 depositions (including three expert depositions) in this case (*id.*, at ¶¶22-24).

It was only after these extensive investigations, and after Plaintiff's motion for class certification was fully briefed, that the parties reached a settlement in this case (*see* Dkt. No. 69). In the weeks prior to reaching a settlement in September 2016, the parties continued to engage in intensive mediation discussions through experienced employment mediator Jeffrey A. Ross (Mullan Decl. ISO Preliminary Approval, ¶31). After lengthy negotiations, the parties agreed to the \$3.45 million settlement amount. Counsel then spent substantial additional time ironing out the details of the Settlement (*id.*, at ¶33).

B. The Court Certified Classes for Settlement Purposes and Granted Preliminary Approval to the Settlement Agreement

On December 19, 2016, the Court granted Plaintiffs' Preliminary Approval Motion (Order Granting Motion for Preliminary Approval, Dkt. No. 87). The Court's Order: (1) determined that the requirements of Rule 23 were satisfied for purposes of certifying the class under Rule 23(a) and Rule 23(b)(3) for settlement; (2) appointed Plaintiff as class representative

1 under Rule 23 and appointed Plaintiff's attorneys as Class Counsel; (3) preliminarily approved
 2 the Parties' class action settlement agreement, finding that it was "fair, adequate, and reasonable
 3 to the Class" (*id.*, at p.1); (4) ordered that notice of the settlement be directed to the Classes in the
 4 form and manner proposed by the Parties; and (5) set May 4, 2017, at 1:30 p.m. as the time for
 5 the Fairness Hearing.

6 Notification of the settlement was provided to the appropriate federal and state officials in
 7 November 2016 under the Class Action Fairness Act, 28 U.S.C. § 1715, with supplemental
 8 notices provided thereafter (Mullan Decl., ¶5).

9 **C. Settlement Fund**

10 The Amended Stipulation of Class Action Settlement and Release preliminarily approved
 11 by the Court, filed as Docket Number 79-1, provides for Defendant to make a non-reversionary
 12 settlement payment to the Class of \$3,450,000 to compensate Class Members, pay reasonable
 13 attorney's fees and costs (up to a maximum of \$1,035,000 in fees⁴ and up to \$60,000 in costs, as
 14 determined by the Court), pay a service payment of \$10,000 to the class representative if the
 15 Court approves the request, pay the costs of the Settlement Administrator (estimated at \$25,000),
 16 and pay \$150,000 to the State of California Labor and Workforce Development Agency (LWDA)
 17 (Amended Stipulation of Class Action Settlement and Release, Dkt. No. 79-1, ¶15). In addition
 18 to the \$3,450,000 Settlement Fund, Defendant will also pay the employer's share of state and
 19 federal payroll taxes (*e.g.*, FICA, FUTA) on all amounts that are paid to Class Members for
 20 unpaid wages.

21 Checks will be mailed directly to each Class Member — no further action is required for a
 22 Class Member to receive a check.⁵ Class Members have 180 days to cash the settlement checks.
 23 After 180 days, if there are uncashed settlement checks or checks mailed to Class Members that

24 ⁴ Plaintiff has moved separately for an award of attorneys' fees and costs, which motion
 25 will be heard at the Final Fairness Hearing (*see* Dkt. Nos. 88-90). In Plaintiff's motion for
 26 attorneys' fees and costs, Plaintiff seeks only \$945,677.50 in attorneys' fees (approximately 27%
 of the settlement fund), which will be considerably less than Class Counsel's lodestar through the
 conclusion of this action.

27 ⁵ As of this time, since no Class Members have opted out, all Class Members are
 28 Participating Class Members.

are returned as undeliverable and for which no updated address can be located, the funds will be dispersed as follows: (1) the total amount of wages represented by the uncashed checks will revert to the California Secretary of State Unclaimed Property Fund so that these Class Members may later claim the funds; and (2) the non-wage portion will go to the Court-approved *cy pres*, which the Parties propose should be Legal Aid at Work, formerly known as the Legal Aid Society of San Francisco, Employment Law Center. There is a substantial nexus between the proposed *cy pres* recipient and the interests of the Class Members in the instant matter. *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 8, 187 L. Ed. 2d 392 (U.S. 2013); *see* Mullan Decl., ¶6).

D. Plan of Distribution to Class Members.

Distributions to Class Members will be made from the remainder of the Settlement Fund after deductions are made for the Settlement Administrator's reasonable costs, court-approved attorney's fees and costs, payment to the LWDA pursuant to PAGA, and any court-approved service payment to the Plaintiff – *i.e.*, the Net Settlement Fund (Amended Stipulation of Class Action Settlement and Release, Dkt. No. 79-1, ¶¶38-39). The Payout Fund is estimated to be at least \$2.25 million (Plaintiff's Motion for Attorneys' Fees and Reimbursement of Costs and Expenses, Dkt. No. 88, p. 5, fn. 3). Class Members are not required to submit claims or take any other affirmative action to be entitled to their shares of the Net Settlement Fund.

The Agreement sets forth a Plan of Distribution for distributing the Net Settlement Fund among Participating Class Members who do not timely opt out (Amended Stipulation of Class Action Settlement and Release, Dkt. No. 79-1, ¶39). Specifically, the Net Settlement Fund will be distributed among participating Class Members on a modified *pro rata* basis. The *pro rata* distribution will be based on a point system to calculate a Class Member's portion of the Net Settlement Fund based on the type of workweek worked (either Turnaround or Maintenance) and whether the Class Member worked during payroll periods ending on or after September 10, 2013.

The Plan of Distribution is intended to more highly compensate Turnaround claims as compared to those related to Maintenance work. In Class Counsel's judgment, the Turnaround claims have a slightly higher potential value, based on Class Counsel's review and analysis of the

1 relative strengths, risks, and potential recoveries associated with the various claims in the
 2 Litigation (*see* Plaintiff's Motion for Preliminary Approval of Class Action Settlement, Dkt.
 3 No. 73, pp. 5-6). Maintenance pay periods are assigned a slightly lower value than turnaround
 4 pay periods (0.75 points for each maintenance workweek versus 1 point for each turnaround
 5 workweek), because, in Class Counsel's view following extensive discovery, claims premised on
 6 maintenance workweeks carry more risk both in terms of the merits of the claims and in terms of
 7 their suitability for class treatment.⁶ Additionally, workweeks for payroll periods ending on or
 8 after September 10, 2013 are weighted more heavily to account for Labor Code Section 226(e)
 9 penalties for pay stub violations (up to a maximum of 39 pay periods), given the one-year statute
 10 of limitations period and the statutory cap on such penalties that would generally be reached after
 11 39 workweeks (Dkt. No. 73, p. 6).

12 As regards what is otherwise a straight *pro rata* method for distributing the Net
 13 Settlement Fund on the basis of the number of qualifying weeks worked by each Participating
 14 Class Member, in light of the types of claims and potential recoveries and associated risks at
 15 issue, the Plan of Distribution cannot be said to significantly prejudice or favor any segment(s) of
 16 the Class relative to any other segment(s) of the Class.

17 **E. Release of Claims**

18 The release in the Agreement provides that all Class Members who do not opt out will
 19 release Defendant from all claims for:

20 [A]ny wage and hour causes of action, claims, damages, benefits, expenses,
 21 penalties, liabilities, demands, obligations, attorneys' fees, costs, and any other
 22 form of relief or remedy in law, equity, of whatever kind or nature, whether
 23 known or unknown, suspected or unsuspected, that were or could have been
 brought in this Action, arising out of, relating to, or in connection with any facts
 and/or claims pled in the class action Complaints, without limitation, including all
 claims for minimum wages, overtime, failure to pay for all work time, travelling to

24 ⁶ As set forth in Plaintiff's Motion for Preliminary Approval of Class Action Settlement
 25 (Dkt. No. 73, pp. 5-6) and the accompanying Declaration of John T. Mullan (Dkt. No. 74, ¶37),
 26 the claims for recovery on maintenance workweeks are somewhat riskier because there is some
 27 evidence that maintenance Field Employees could be assigned to work unique jobs within the
 28 refinery that do not require the same extra-shift procedures as those required of turnaround Field
 Employees. Additionally, turnaround Field Employees are more likely to have claims for waiting
 time penalties because they worked on temporary projects and were routinely laid off when the
 project was complete.

and from the worksite within the facility, undergoing security searches, receiving personal protective equipment (“PPE”), attending safety meetings, returning PPE, and leaving the facility at the end of the shift, being subject to drug or alcohol testing, failure to provide accurate wage statements, failure to provide all wages at time of termination, PAGA penalties, waiting time penalties under Labor Code 201-203, and claims arising out of any other state, federal or local wage and hour laws (provided however, that claims under the FLSA are only released for those Class Members endorsing and cashing their settlement check), and related claims for interest, attorneys’ fees and costs, including claims for restitution and other injunctive and/or equitable relief from September 10, 2010, through the date of Preliminary Approval (collectively, the “Released Claims”).

(Amended Stipulation of Class Action Settlement and Release, Dkt. No. 79-1, ¶57).

In addition to these releases, the Agreement also provides that Plaintiff Woodruff, should he be awarded a Court-approved service payment, must execute and provide to Defendant an individual general release (*ibid.*).

F. Settlement Administration

1. Class Notice

Pursuant to the Order Granting Motion for Preliminary Approval, on February 6, 2017, the Settlement Administrator mailed the approved Class Notice to putative Class Members identified by Defendant (Myette Decl., ¶¶7-9). Consistent with the parties’ Agreement and the Order Granting Preliminary Approval, the Settlement Administrator searched for more recent addresses, took all reasonable steps to obtain correct addresses for Class Members whose Notices were returned undeliverable, and re-mailed Notices to Class Members for whom new addresses were located (*id.*, at ¶10).⁷ The Settlement Administrator also established a website and toll-free phone number to respond to Class Members’ questions regarding the settlement (*id.*, at ¶¶4-5).

2. There Have Been No Opt Outs.

Class Members who wish to opt out of the Settlement are required to submit a written and signed request for exclusion by the April 7, 2017 deadline specified in the Agreement and provided in the Class Notice (Amended Stipulation of Class Action Settlement and Release, Dkt. No. 79-1, ¶53; Order Granting Motion for Preliminary Approval, Dkt. No. 87, p. 3). A request

⁷ Specifically, after performing address traces on Class Notices that were initially returned as undeliverable, the Settlement Administrator re-mailed 196 notices to an updated traced address. As of March 20, 2017, 64 Class Notices were undeliverable (Myette Decl., ¶10).

1 for exclusion will be timely if it is mailed to the Settlement Administrator and postmarked by
 2 April 7, 2017 (*see* Order Granting Motion for Preliminary Approval, Dkt. No. 87, p. 3; Myette
 3 Decl., ¶9).

4 As of March 20, 2017, the Settlement Administrator has received no requests for
 5 exclusion (Myette Decl., ¶11). Accordingly, out of a Class of 2,588 members, no Class Member
 6 has excluded him or herself from the settlement.

7 **3. Counsel Are Not Aware of any Class Member Objections to the**
Settlement or any of its Terms.

8 Class Members who do not opt out and who wish to object to the Settlement can do so by
 9 submitting written objections to the Court by April 7, 2017, the deadline specified in the parties'
 10 Agreement, the Court's Preliminary Approval Order, and provided in the Class Notice (Order
 11 Granting Motion for Preliminary Approval, Dkt. No. 87, p. 3; Myette Decl., ¶9).

12 Class Counsel are not aware of any objections sent to and filed by the Court (Mullan
 13 Decl., ¶3). Class Counsel has not received any objections from any Class Member, whether
 14 formal or informal (*ibid.*). Additionally, as of March 20th, no Class Member has submitted any
 15 objection to the Settlement Administrator (Myette Decl., ¶12).

16 **4. Challenges to Workweeks Calculated by the Settlement Administrator.**

17 Class Members were given the opportunity to challenge the number of applicable
 18 workweeks printed in their Notice by submitting a written letter postmarked by April 7, 2017.
 19 The Settlement Administrator has to date received no such challenges to the number of
 20 workweeks printed in the Class Members' Notices (Myette Decl., ¶13).

21 **III. DISCUSSION**

22 **A. Final Confirmation of Class Certification is Appropriate.**

23 The Order Granting Motion for Preliminary Approval certified the Class for settlement
 24 purposes under Rule 23 of the Federal Rules of Civil Procedure, appointed Plaintiff Woodruff as
 25 the representative for the Class, and appointed Plaintiff's attorneys as Class Counsel (Dkt.
 26 No. 87). The Court found, for purposes of settlement, that the Class meets all of the requirement
 27 for maintenance of a class action under Rule 23(a) and Rule 23(b)(3) (*ibid.*).

28 ///

1 Notice of the class action was directed to all Class Members in a form and manner that
 2 complied with Rule 23 (*see supra* § II.F.1). As of today's date, Class Counsel are not aware of
 3 any objections by a Class Member to any aspect of the Court's order preliminarily approving the
 4 settlement and none of the 2,588 Class Members opted out.

5 For these reasons, and for the reasons set forth in Plaintiff's Motion for Preliminary
 6 Approval of Class Action Settlement (Dkt. No. 73) and the Parties' Joint Response in Support of
 7 Plaintiff's Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 78), the Court
 8 should confirm the certification of this action as a settlement class action and the appointment of
 9 Plaintiff as the Class Representative.

10 **B. Final Settlement Approval is Appropriate.**

11 In order to approve a settlement that would bind class members, the court must find, after
 12 notice and a hearing, that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ.
 13 P. 23(e)(2).

14 "[T]here is a strong judicial policy that favors settlements, particularly where complex
 15 class action litigation is concerned." *In re Syncor Erisa Litig.*, 516 F.3d 1095, 1101 (9th Cir.
 16 2008). "Despite the importance of fairness, the court must also be mindful of the Ninth Circuit's
 17 policy favoring settlement, particularly in class action law suits." *In re Omnivision Tech., Inc.*,
 18 559 F.Supp.2d 1036, 1041 (N.D. Cal. 2008) (Conti, J.). While "[t]he court must find that the
 19 proposed settlement is fundamentally fair, adequate, and reasonable" (*id.*, at 1040), "the court's
 20 inquiry is ultimately limited 'to the extent necessary to reach a reasoned judgment that the
 21 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
 22 parties.' . . . The court, in evaluating the agreement of the parties, is not to reach the merits of the
 23 case or to form conclusions about the underlying questions of law or fact." *Ibid.* (citation
 24 omitted; quoting *Officers for Justice v. Civil Serv. Comm'n of the City and County of San*
 25 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)).

26 **1. The settlement is entitled to a strong presumption of fairness.**

27 "When seeking final approval, plaintiffs may establish a presumption of fairness by
 28 demonstrating: '(1) [t]hat the settlement has been arrived at [through] arm's-length bargaining;

(2) [t]hat sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently; (3) [t]hat the proponents of the settlement are counsel experienced in similar litigation; and (4) [t]hat the number of objectors or interests they represent is not large when compared to the class as a whole.” *Trew v. Volvo Cars of N. Am., LLC*, No. 05-1379, 2007 WL 2239210, *2 (E.D. Cal. Jul. 31, 2007) (quoting Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 11:41 (2006)); see *Wren v. RGIS Inventory Specialists*, No. 06-05778, 2011 WL 1230826, *6 (N.D. Cal. Apr. 1, 2011) (Spero, M.J.) (initial presumption of fairness is usually established if settlement is recommended by class counsel after arm’s-length bargaining).

In this case, as discussed more extensively in Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 73, pp. 11, 17-18) and in Plaintiff’s Motion for Attorneys’ Fees (Dkt. No. 88): (1) Class Counsel are highly experienced in class action wage and hour litigation; (2) Plaintiff (and Defendant) conducted extensive discovery, investigation, and motion practice that allowed Class Counsel to act intelligently in negotiating and recommending the settlement; and, (3) the Parties arrived at the settlement through arms-length bargaining involving competent and experienced counsel. In addition, as of this time, there are no objectors to the settlement (Mullan Decl., ¶3; Myette Decl., ¶12).

For these reasons, there is a strong presumption that the proposed settlement is fair to the Class. *Trew*, 2007 WL 2239210 at *2; see *Wren*, 2011 WL 1230826 at *6.

2. **The settlement is fair, reasonable, and adequate.**

The Ninth Circuit has identified several factors the district court should consider, as applicable, in reaching its determination of whether a proposed class action settlement is fair, reasonable, and adequate.

The district court’s ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

1 *Officers for Justice*, 688 F.2d at 625. “This list is not exclusive and different factors may
 2 predominate in different factual contexts.” *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376
 3 (9th Cir. 1993).

4 All the relevant factors identified by the Ninth Circuit weigh in favor of settlement
 5 approval in this case.

6 **a. The strength of Plaintiff’s case and the risk of maintaining class
 action status throughout the trial.**

7 Plaintiff is convinced of the strengths of his claims. However, Defendant is equally
 8 adamant about the strength of its defenses. As is clear from the motion practice in this case,
 9 including the hotly contested motion for class certification that was fully briefed and set for
 10 hearing before the settlement agreement was reached, Plaintiff’s claims and Defendant’s defenses
 11 give rise to a number of critical, disputed factual and legal issues that go to the core of Plaintiff’s
 12 claims and theories of liability and, by extension, to Plaintiff’s entitlement to recover damages
 13 and penalties, and/or the proper measure of damages.

14 As is set forth in greater detail in the Declaration of John Mullan In Support of Plaintiff’s
 15 Motion for Preliminary Approval, Dkt. No. 74, pages 12-15, Plaintiff would have to prevail over
 16 Defendant’s arguments that requiring Class Members to arrive at work prior to the start of their
 17 compensable shifts to don required safety gear, obtain tools, attend safety meetings, congregate at
 18 designated places, and be transported to their intra-refinery work locations does not constitute
 19 compensable work under the California Labor Code. Plaintiff would also have to overcome
 20 Defendant’s arguments regarding exemption for certain unionized employees and various
 21 preemption arguments. Additionally, there was risk as to Plaintiff’s claims for wage statement
 22 violations and waiting time penalties, which require a finding that Defendant’s failures to comply
 23 with the Labor Code were “knowing and intentional” or “willful”, respectively. While Plaintiff
 24 believes his arguments, as set forth in part in his opposition to Defendant’s motion for class
 25 certification, are very strong and should have been successful, Plaintiff was not guaranteed to prevail.

26 Plaintiff also faced significant risks in obtaining class certification. Plaintiff had filed a
 27 motion for class certification, which Defendant opposed with hundreds of pages of argument and
 28 evidence (Dkt. Nos. 56-57). The motion presented substantial legal and factual uncertainty

1 regarding whether Plaintiff's case could proceed as a class action.

2 The risks and uncertainties facing the claims of Plaintiff and the Class weigh in favor of
3 settlement approval.

4 **b. The risk, expense, complexity, and likely duration of further**
5 **litigation.**

6 Whatever the strength of his claims, Plaintiff nonetheless faced numerous obstacles to
7 recovery, including likely challenges to the use of representative testimony and expert witnesses
8 to establish class wide liability and aggregate damages, challenges to Class Members' testimony
9 concerning how much uncompensated time they worked, challenges to Plaintiff's methodology
10 for calculating damages and penalties, and having to defend against Defendant's preemption and
11 exemption defenses.

12 The litigation regarding class certification had been, and would continue to have been,
13 expensive and time consuming. Assuming the Court certified a class action for trial, Defendant
14 could have appealed from a class certification order, which might have delayed the proceedings
15 considerably and been very expensive.

16 Additionally, if this case had proceeded to trial, the time and expenses associated with
17 trial preparation would have been considerable. The parties would have had to prepare expert
18 reports and conduct expert discovery, prepare and defend against motions *in limine*, draft trial
19 briefs, prepare deposition designations and trial exhibits, and, ultimately, try the case. A class
20 action trial in this case would be manageable, but it would also be complex, expensive, and
21 extremely time-consuming. Even if Plaintiff obtained a favorable verdict and judgment on his
22 claims, Plaintiff and the Class would face additional expenses and delay if, as is likely, Defendant
23 were to appeal.

24 Taken together, these considerations support approval of the settlement.

25 **c. Settlement amount.**

26 In determining whether a settlement is fair, reasonable, and adequate, the court must
27 consider the amount offered in settlement. *Officers for Justice*, 688 F.2d at 625. Under the terms
28 of the Agreement, Defendant is required to make a total settlement payment of \$3,450,000. That

1 amount is non-reversionary. The settlement amount compares favorably with wage-and-hour
 2 settlements approved by the Court in the past. For example, in *Viceral v. Mistras Group, Inc.*,
 3 No. 15-2198 (N.D. Cal. Oct. 11, 2016) (Dkt. No. 83), the Court granted preliminary approval to a
 4 class action settlement for alleged off-the-clock uncompensated work and meal-and-rest period
 5 violations where the average workweek recovery was \$24.05 for a California class and \$5.06 for
 6 FLSA class members. In comparison, Class Members in this case stand to recover an estimated
 7 \$36 per workweek (*see* Plaintiff's Motion for Attorneys' Fees and Costs, Dkt. No. 88, p. 5).
 8 Additionally, the average gross settlement amount of approximately \$900 for each of the
 9 temporary employee Class Members compares favorably to that approved in *Strickland*, a wage-
 10 and-hour case against Defendant Timec that involved additional claims for meal and rest breaks
 11 not at issue here. In *Strickland*, the average estimated settlement was \$696 (*see* Mullan Decl.
 12 ISO Preliminary Approval, ¶40 and Ex. 3).

13 The settlement figures are significant amounts in absolute terms, and they are also
 14 significant amounts when viewed in the context of the case, where the Class Members are
 15 relatively low-paid, primarily part-time workers (Mullan Decl. ISO Preliminary Approval, ¶43).

16 Defendant will pay the entire \$3,450,000 settlement amount, plus applicable payroll taxes
 17 on amounts designated as wages. Class Members are not required to submit claims or take any
 18 other action to receive their settlement shares, which should result in a much higher percentage of
 19 the Class receiving money under the Settlement than would be the case if some affirmative action
 20 were required. After 180 days, if any Class Member checks are not cashed, the total amount of
 21 wages represented by the uncashed checks will revert to the California Secretary of State
 22 Unclaimed Property Fund so that these Class Members may later claim the funds. The non-wage
 23 portion will go to the Court-approved *cy pres*, which Plaintiff proposes should be Legal Aid at
 24 Work, formerly the Legal Aid Society of San Francisco–Employment Law Center (Amended
 25 Stipulation of Class Action Settlement and Release, Dkt. No. 79-1, at ¶40).⁸

26 _____
 27 ⁸ The Settlement Administrator will mail a reminder postcard for Class Members who
 28 have not cashed their checks after ninety (90) calendar days of mailing (Amended Stipulation of
 Class Action Settlement and Release, 79-1, ¶52).

d. Extent of discovery and investigation completed.

As detailed in Plaintiff’s Motion for Preliminary Approval and in the accompanying Declaration of John T. Mullan (Dkt. Nos. 73 and 74), Plaintiff (and Defendant) has conducted extensive discovery and investigation. Discovery and investigation have included, but not been limited to, the following: interviews with the class representatives and approximately 50 Class Members, requests for production of documents and review of the over 8,000 pages of documents produced by Defendant, and propounding and responding to written discovery, including interrogatories (Mullan Decl. ISO Preliminary Approval (Dkt. No. 74), ¶¶21-22). Plaintiff took depositions of two of Timec’s corporate designees pursuant to Rule 30(b)(6), defended the depositions of Plaintiff and six putative class members, took the deposition of ten of Defendant’s witnesses, and took and defended expert witness depositions (*id.*, at ¶¶23-24).

Given the substantial scope and amount of discovery and investigation completed, Plaintiff had more than sufficient information to make an informed decision about settlement.

1 This factor weighs heavily in favor of final settlement approval.

2 **e. Experience and views of counsel.**

3 As detailed in Plaintiff's Motion for Attorneys' Fees and Costs, and in the accompanying
 4 attorney declarations, Class Counsel have had extensive experience and success litigating, trying,
 5 and settling wage and hour class actions (Motion for Attorneys' Fees and Costs, Dkt. No. 88,
 6 p. 10; Declaration of John T. Mullan, Dkt. No. 89, ¶¶3-20; Declaration of Jay Jambeck, Dkt.
 7 No. 90, ¶¶3-6). Class Counsel are very knowledgeable about the strengths, weaknesses and
 8 potential value of the Class's claims (Mullan Decl. ISO Preliminary Approval, Dkt. No. 74,
 9 pp. 12-15.) Class Counsel believe that the amount of the settlement is "fair, reasonable, and
 10 adequate," and that "[c]onsidering the risks of continued litigation . . . , this settlement is within
 11 the range of reasonableness and fair to the Class" (*id.*, at ¶46). Class Counsel's experience and
 12 view of the settlement are factors weighing in support of final settlement approval. *See, e.g.,*
 13 *Wren*, 2011 WL 1230826 at *10.

14 **f. Class Members' reactions to the proposed settlement.**

15 Out of approximately 2,588 Class Members, to date no Class Member has submitted any
 16 objections and no Class Member has opted out. Additionally, no Class Member has submitted a
 17 challenge to the Settlement Administrator or to Class Counsel regarding his or her individual
 18 determination of workweeks worked during the class period. The absence of objections and opt
 19 outs is a strong indication that the Class has a favorable view of the settlement. This factor too
 20 weighs in favor of final settlement approval. *Officers for Justice*, 688 F.2d at 625; *Nat'l Rural*
 21 *Telecomm. Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("the absence
 22 of a large number of objections to a proposed class action settlement raises a strong presumption
 23 that the terms of a proposed class action settlement are favorable to the class members"); *see also*
 24 *Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-1365, 2010 WL 1687832, at * 14 (N.D. Cal.
 25 Apr. 22, 2010) (Wilken, J.) (citing *Nat'l Rural Telecomm. Cooperative*).

26 To conclude, the proposed settlement is presumptively fair, and all the relevant factors set
 27 forth by the Ninth Circuit for considering whether to approve a class action settlement weigh in
 28 favor of granting final approval to the proposed settlement in this case. Therefore, the Court

1 should grant final approval to the settlement.

2 **3. The Settlement Provides a Substantial Payment to the LWDA in**
 3 **Consideration for the Settlement of the PAGA Claim.**

4 As set forth at length in Plaintiff's Motion for Preliminary Approval (Dkt. No. 73, pp. 20-
 5 22), the allocation of \$200,000 to the PAGA claim is appropriate where (1) the Settlement
 6 provides substantial relief to Class Members through a significant settlement payment from
 7 Defendant, promoting PAGA's principles in protecting employee rights and (2) the allocation to
 8 the PAGA award represents substantial relief to the Class given the risks of pursuing a jury
 9 verdict.

10 Additionally, the Labor and Workforce Development Agency, the agency tasked with
 11 administering PAGA, was provided notice of the Settlement and has not objected or responded to
 12 the Settlement (Mullan Decl., ¶4).

13 **C. The Court Should Grant Final Approval to the Payment of a Service Award to**
 14 **Representative Plaintiff Woodruff.**

15 As contemplated by the Parties' Agreement (Dkt. No. 79-1, ¶15), the Representative
 16 Plaintiff, Kevin Woodruff, hereby applies for the award of a service payment of \$10,000 to be
 17 paid from the Settlement Fund for his time, efforts, and sacrifices on behalf of the Class. Class
 18 Members received notice of the request for a service award and no Class Members has objected.
 19 The Court should now approve the requested service award for Plaintiff Woodruff.

20 **1. Plaintiff Woodruff Contributed Substantially to this Litigation, to the**
 21 **Benefit of the Class.**

22 Class representatives play a crucial role in bringing justice to those who would otherwise
 23 be unable to vindicate their rights. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958–
 24 59 (9th Cir. 2009) (incentive awards may recognize a plaintiff's "willingness to act as a private
 25 attorney general"). In the Ninth Circuit, "[i]ncentive awards are fairly typical in class action
 26 cases." *Id.*, at 958. "Numerous courts in the Ninth Circuit and elsewhere have approved
 27 incentive awards of \$20,000 or more where . . . the class representative has demonstrated a strong
 28 commitment to the class." *Garner v. State Farm Mut. Auto Ins.*, No. 08-CV-1365 CW, 2010 WL
 1687832, at *17, n.8 (N.D. Cal. Apr. 22, 2010) (collecting cases); *see also* Mullan Dec in Support

1 of Motion for Attorneys' Fees and cases cited therein, ¶¶5-16 (Dkt. No. 89). In examining this
 2 commitment to the class and the reasonableness of a requested service payment, courts must
 3 consider all "relevant factors includ[ing] the actions the plaintiff has taken to protect the interests
 4 of the class, the degree to which the class has benefitted from those actions, . . . the amount of
 5 time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of]
 6 workplace retaliation." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (citation
 7 omitted). Additionally, to ensure that an incentive payment is not excessive, the court should
 8 balance "the number of named plaintiffs receiving incentive payments, the proportion of the
 9 payments relative to the settlement amount, and the size of each payment." *Ibid.*

10 Here, Plaintiff Woodruff's services protected the interests of the Class and resulted in a
 11 benefit to the Class as a whole. Mr. Woodruff expended substantial time and effort in the
 12 prosecution and settlement of this case. He estimates that he spent approximately 29-30 hours
 13 working on the case (Declaration of Kevin Woodruff ("Woodruff Decl."), ¶¶4-10). In the course
 14 of his service as a representative plaintiff in this case, Mr. Woodruff: (1) communicated
 15 extensively with Class Counsel regarding facts, issues, documents, scheduling, and potential
 16 witnesses in the case; (2) traveled significant distances to attend his deposition; (3) prepared and
 17 sat for a full-day deposition and reviewed his deposition transcript for errors; (4) worked with
 18 Class Counsel to respond to requests for production of documents and searched for and provided
 19 documents to Class Counsel; (5) worked extensively with Class Counsel to respond to
 20 Defendant's interrogatories; (6) worked with Class Counsel to prepare draft declarations to be
 21 filed in support of class certification; and (7) made himself available by telephone during the
 22 mediation (Woodruff Decl., ¶¶5-10).

23 Moreover, the number of hours that Plaintiff expended fails to capture the value added to
 24 this case by his efforts. Plaintiff provided Class Counsel with information about and documents
 25 confirming his working conditions and compensation received that were essential to framing the
 26 claims in Plaintiff's multiple Complaints and in prosecuting the case (Mullan Decl., ¶7).

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28 ///

2. **Plaintiff Woodruff Shouldered Unique Risks in His Role as a Representative Plaintiff.**

Service awards are particularly appropriate in wage-and-hour actions where plaintiffs undertake a significant “reputational risk” by bringing suit against their former employers. *Rodriguez*, 563 F.3d at 958-59; *Brazil v. Dell Inc.*, No. C-07-01700 RMW, 2012 WL 1144303, at *2-3 (N.D. Cal. Apr. 4, 2012). In the workplace context, where workers are often blacklisted if they are considered “trouble makers,” employees who sue their employers are particularly vulnerable to retaliation and termination—a paralyzing fear for workers in this harsh economic climate. *See In re High-Tech Emp. Litig.*, 11-CV-02509 LHK, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015) (granting service awards based in part on the named plaintiffs’ risk of future workplace retaliation and diminished future employment prospects for being labeled “troublemakers” in their industry); *Connolly v. Weight Watchers N. Am. Inc.*, No. 14-CV-01983 TEH, 2014 WL 3611143, at *4 (N.D. Cal. July 21, 2014) (named plaintiffs assume “the risk of being stigmatized or disfavored by their current or potential future employers by suing their employer”); *Bredbenner v. Liberty Travel, Inc.*, No. CIV.A. 09-1248 MF, 2011 WL 1344745, at *23 (D.N.J. Apr. 8, 2011) (awarding enhancements to named plaintiffs in recognition that “they risk their good will and job security in the industry for the benefit of the class as a whole”); *Ross v. U.S. Bank Nat’l Ass’n*, No. C07-02951SI, 2010 WL 3833922, at *2 (N.D. Cal. Sept. 29, 2010) (enhancements based on “willingness to serve as representatives despite the potential stigma that might attach to them in the banking industry from taking on those roles”).

Here, Plaintiff undertook significant risks in coming forward and being the named representative in a suit against his employer. Plaintiff had to overcome his fear of retaliation and industry ostracization to serve as a named plaintiff in this lawsuit. Plaintiff’s employment situation was particularly risky for Plaintiff, as he was employed by Defendant as a temporary worker, subject to layoff and rehiring as the company’s needs required. He was employed by Defendant at various times from on or about January 2014 through the present time. Accordingly, he was highly concerned about and susceptible to potential retaliation, including through not being called back to be rehired (Woodruff Decl., ¶11). Additionally, Plaintiff documents the fear that he continues to have regarding future negative impacts on his employment if a potential future employer discovers (from a

1 simple internet search) that he initiated a class action lawsuit against his employer. *See* Woodruff
 2 Decl., ¶12; *Guippone v. BH S&B Holdings, LLC.*, No. 09-CV-01029 CM, 2011 WL 5148650, at *7
 3 (S.D.N.Y. Oct. 28, 2011) (“Today, the fact that a plaintiff has filed a federal lawsuit is searchable on
 4 the internet and may become known to prospective employers when evaluating that person.”);
 5 *Connolly*, 2014 WL 3611143, at *4 (recognizing named plaintiffs assume “the risk of being
 6 stigmatized or disfavored by their current or potential future employers by suing their employer”).

7 Although Plaintiff could likely have confidentially resolved his individual claim, he was
 8 willing to risk exposure and act as a named plaintiff to secure a remedy not only for himself, but for
 9 his fellow workers who might be unwilling, afraid, or unable to bring their own case (Woodruff
 10 Decl., ¶14). *See* Nantiya Ruan, *Bringing Sense to Incentive Payments: An Examination of Incentive*
 11 *Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 Emp. Rts. & Emp.
 12 Pol’y J. 395 (2006) (discussing the realistic fear of reprisal facing employees who bring workplace
 13 law class actions). The risk of retaliation and deterred future employment weighs in favor of the
 14 requested service award.

15 **3. The Requested Service Award is Reasonable.**

16 The amount of the requested service award is reasonable. The \$10,000 amount
 17 constitutes a very small fraction of the Settlement Fund, resulting in little detriment to the Class.
 18 The award is reasonable in this case in view of the extent of the time and effort expended by the
 19 named Plaintiff and is in line with awards approved in other cases. *See, e.g., In re High-Tech*
 20 *Emp. Litig.*, 2015 WL 5158730 at *16-18 (granting service awards of \$120,000 for one named
 21 plaintiff and \$80,000 for four other named plaintiffs in antitrust action based on their “hundreds”
 22 of hours worked in furtherance of the litigation and reasonable fear of future workplace
 23 retaliation, where class members were expected to receive roughly \$5,770 each); *Garner*, 2010
 24 WL 1687832, at *17 n.8 (“Numerous courts in the Ninth Circuit and elsewhere have approved
 25 incentive awards of \$20,000 or more”) (collecting cases); *Graham v. Overland Solutions, Inc.*,
 26 No. 10-CV-0672 BEN, 2012 WL 4009547, at *8 (S.D. Cal. Sept. 12, 2012) (awarding \$25,000 to
 27 each named plaintiff “for their time, effort, risks undertaken for the payment of costs in the event
 28 this action had been unsuccessful, stigma upon future employment opportunities for having

1 initiated an action against a former employer, and a general release of all claims related to their
 2 employment”); *Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *16-
 3 17 (N.D. Cal. Jan. 26, 2007) *aff’d*, 331 F. App’x 452 (9th Cir. 2009) (approving payments of
 4 \$25,000 to each named plaintiff); *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299-
 5 300 (N.D. Cal. 1995) (awarding \$50,000 to a lead plaintiff); *Satchell v. Fed. Express Corp.*, Nos.
 6 C-03-2659 SI, C-03-2878 SI, 2007 WL 1114010, at *5-6 (N.D. Cal. Apr. 13, 2007) (preliminarily
 7 approving awards of up to \$30,000 each to class representatives and up to \$5,000 each to 18 class
 8 members who signed declarations and were deposed); *see also* Mullan Preliminary Approval
 9 Decl. ¶¶5-18. For example, in *Connolly v. Weight Watchers North America, Inc.*, No. 14-cv-
 10 01983-TEH (N.D. Cal. 2014) (Henderson, J.), Class Counsel firm Rudy, Exelrod, Zieff, & Lowe,
 11 LLP, represented employees in a wage-and-hour class action alleging, *inter alia*, unpaid off-the-
 12 clock work and unreimbursed business expenses. This Court granted final approval to the
 13 plaintiffs’ proposed class action settlement and approved service payments of \$12,500 and
 14 \$10,000 to the two class representatives (Mullan Preliminary Approval Decl. ¶18).

15 In addition, Plaintiff agreed to execute a much broader release than the releases that apply to
 16 other class members. This warrants additional compensation. *Dent v. ITC Serv. Grp., Inc.*, No. 12-
 17 CV-0009 JCM, 2013 WL 5437331, at *4 (D. Nev. Sept. 27, 2013) (awarding enhancement in part
 18 because wage plaintiff signed a general release); *Wade v. Kroger Co.*, No. 01-CV-699 R, 2008 WL
 19 4999171, at *13 (W.D. Ky. Nov. 20, 2008) (awarding plaintiffs additional compensation because they
 20 agreed to a “release of all claims . . . that is broader than the release given by other members of this
 21 class”); *Carlson v. C.H. Robinson Worldwide, Inc.*, No. 02-CV-3780 JNE, 2006 WL 2671105, at *4
 22 (D. Minn. Sept. 18, 2006) (authorizing additional payments to plaintiffs who “g[a]ve additional
 23 consideration-that is, a broader release of claims than the release to be signed by other class
 24 members”).

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully submits that the Court should grant his
3 Motion for Final Approval and for Entry of Judgment, enter the proposed order that has been
4 agreed to by the Parties and submitted to the Court, and enter judgment.

5
6 DATED: March 30, 2017

Respectfully submitted,

7 RUDY, EXELROD, ZIEFF & LOWE, LLP
8 LEIGH LAW GROUP

9 By: /s/ John T. Mullan

10 JOHN T. MULLAN

11 *Attorneys for Plaintiff KEVIN WOODRUFF*
12 *and class of those similarly situated*